

ORIGINAL No. 05-35569

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, et al.

MOATT

Plaintiffs-Appellees,

v.

JUN 21 2005

NATIONAL MARINE FISHERIES SERVICE, and

INITIAL fn

UNITED STATES ARMY CORPS OF ENGINEERS;

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
No. CV-01-00640-RE

TREATY TRIBES' JOINT MOTION FOR LEAVE TO FILE A JOINT  
AMICUS CURIAE BRIEF

DAVID J. CUMMINGS, OSB# 92269  
Nez Perce Tribe  
Office of Legal Counsel  
P. O. Box 305  
Lapwai, ID 83540  
(208) 843-7355  
(208) 843-7377 (fax)  
*Attorney for Amicus Curiae Applicant Nez  
Perce Tribe*

Howard G. Arnett, OSB# 77099  
Karnopp Petersen, LLP  
1201 NW Wall Street, Suite 300  
Bend, OR 97701-1957  
541-382-3011  
541-388-5410, fax  
*Attorney for Amicus Curiae Applicant  
Confederated Tribes of the Warm Springs  
Reservation of Oregon*

Christopher B. Leahy, CSB# 23612  
Fredericks, Pelcyger & Hester, LLC  
1075 S. Boulder Road, Suite 3095  
Louisville, CO 80027  
(303) 673-9600  
(303) 673-9839, fax  
*Attorney for Amicus Curiae Applicant  
Confederated Tribes of the Umatilla  
Reservation*

Tim Weaver, WSB# 3364  
Law Offices of Tim Weaver  
P. O. Box 487  
Yakima, WA 98907  
509-575-1500  
509-575-1227, fax  
*Attorney for Amicus Curiae Applicant  
Confederated Tribes and Bands of the Yakama  
Indian Nation*

RECEIVED  
CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS  
JUN 20 2005  
FILED 6-20-05  
DOCKETED 6-22-05  
DATE  
INITIAL AD

## Introduction

The Nez Perce Tribe, the Confederated Tribes and Bands of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation (the “Columbia River Treaty Tribes”) jointly request leave from this Court to participate as *amicus curiae* and to file the accompanying joint *amicus curiae* brief. The Columbia River Treaty Tribes’ participation as *amicus curiae* will provide this Court with the Treaty Tribes’ views on the relevant factual and legal considerations in the disposition of this case, and demonstrate how the disposition of this case will affect the Treaty Tribes’ rights and interests. This Court has previously granted the Treaty Tribes’ joint motion for leave to appear as *amicus curiae* in prior appeals in this proceeding. *National Wildlife Fed’n v. National Marine Fisheries Service (NWF v. NMFS)*, No. 04-35673, Order (9<sup>th</sup> Cir. August 13, 2004).

Rule 29(b) of the Federal Rules of Appellate Procedure (FRAP) provides that a motion for leave<sup>1</sup> to participate as *amicus curiae* “must be accompanied by

---

<sup>1</sup> FRAP 29(a) provides that “a State, Territory, Commonwealth, or the District of Columbia may file an *amicus-curiae* brief without the consent of the parties or leave of court.” The Columbia River Treaty Tribes, as sovereign governments, enjoy a status similar to the other entities identified in FRAP 29(a). However, the Treaty Tribes submit this motion for leave as provided in FRAP

the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

### **The Treaty Tribes' Interests**

Each of the Columbia River Treaty Tribes is a federally recognized Indian tribe. Through treaties, each of these tribes ceded millions of acres of land in the Pacific Northwest to the United States but reserved the right of "taking fish at all usual and accustomed places in common with citizens of the Territory." *Treaty with the Nez Perces*, 12 Stat. 957, Art. 3 (June 11, 1855). See *Treaty with the Tribes of the Middle Oregon (Confederated Tribes of the Warm Springs Reservation of Oregon)*, 12 Stat. 963 (June 25, 1855); *Treaty with the Yakama*, 12 Stat. 951 (June 9, 1855); *Treaty with the Wallawalla, Cayuse, etc. (Confederated Tribes of the Umatilla Indian Reservation)*, 12 Stat. 945 (June 9, 1855). Retaining the right to continue traditional fishing practices was a primary objective of the Tribes during treaty negotiations. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 664-69 (1973). The treaties guarantee to the Tribes an equitable share of the fish, *United States v. Oregon*, 302 F. Supp. 899 (D. Or. 1969), *United*

---

29(b).

*States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), as well the right to have these fish present for harvest. *Commercial Passenger Fishing Vessel*, *supra*.

### **The Significance and Relevance of the Treaty Tribes' Interests to the Disposition of this Case**

The series of dams and reservoirs that make up the Federal Columbia River Power System (FCRPS or DAMS), operated by the Defendant-Appellant U.S. Army Corps of Engineers (Corps) and the Bureau of Reclamation (Bureau), directly affect the survival of fish that pass the Columbia River Treaty Tribes' usual and accustomed fishing places, and on which the Treaty Tribes' members rely for ceremonial, subsistence, and commercial purposes.

Each of the Columbia River Treaty Tribes, individually and through their membership in the Columbia River Inter-Tribal Fish Commission, actively participate in numerous activities relating to the protection and restoration of anadromous fish stocks passing through each of the Treaty Tribes' usual and accustomed fishing places on the Columbia River and its tributaries. These activities include efforts to affect the Defendant-Appellant Corps' decision-making regarding the operation of the DAMS and the impact of these dams on salmon, and to affect the Defendant-Appellant NOAA Fisheries' administration of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, with respect to the

impact of the DAMS on listed salmon.

As co-managers of the salmon resource, the Columbia River Treaty Tribes provided extensive technical, policy, and legal concerns as NOAA has developed a series of biological opinions for the FCRPS, including the 2000 FCRPS Biological Opinion and the 2004 FCRPS Biological Opinion which the District Court ruled were arbitrary, capricious and contrary to law. *NWF v. NMFS*, 254 F. Supp. 2d 1196 (D.Or. 2003) and CV-01-640-RE/CV 05-23-RE, Docket #986 (May 26, 2005). The Columbia River Treaty Tribes also provided extensive input, critique, and analysis to the efforts and decisions of the Corps, Bonneville Power Administration, and NOAA Fisheries concerning the importance of improving travel time for juvenile fall Chinook through flow, spill and drawdown, which ultimately led to the injunction that is the subject of this appeal. *NWF v. NMFS*, Opinion and Order, Docket #1015 (June 10, 2005).

For the past decade, each of the Columbia River Treaty Tribes have actively participated as *amicus curiae* in numerous lawsuits concerning the operation of the DAMS and NOAA Fisheries' administration of the ESA relative to the DAMS, including this case.<sup>2</sup> In this case, *NWF v. NMFS*, each of the Columbia River

---

<sup>2</sup> *Aluminum Co. of America, et al. v. Brown, et al.* (Civ. No. 92-160-MA, D. Or.); *Pacific Northwest Generating Cooperative v. Brown, et al.* (Civ. No. 92-973-MA, D.Or.); *Public Power Council v. Brown, et al.* (Civ. No. 92-1264-MA,

Treaty Tribes individually sought, and were granted, *amicus curiae* status.

(Docket #19, 29, 58, 189). Consistent with the District Court's discretion to allow *amicus curiae* to assist the Court on legal and factual issues, the Columbia River Treaty Tribes have actively participated in these proceedings. As the District Court recently noted:

the Tribes, in one form or another, have been involved in FCRPS endangered species issues for many years. It would be counterproductive to exclude them from meaningful participation in this case, which includes the ability to present both legal arguments and extra-record materials that are of assistance to the court and fall within the limited scope of the court's judicial review under the APA.

*NWF v. NMFS*, Opinion and Order, Docket # 891, p. 9 (April 8, 2005).

In addition to the Treaty Tribes' filings in this case involving the successful challenge to the 2000 BiOp and the successful challenge to the federal government's 2003 decision to curtail spill,<sup>3</sup> the Treaty Tribes have actively

---

D.Or.); *Idaho Dep't of Fish and Game v. National Marine Fisheries Serv.* (Civ. No. 93-1603-MA, D.Or.); *American Rivers, et al. v. National Marine Fisheries Serv.* (Civ. No. 96-384-MA, D.Or.); and this case, *National Wildlife Fed'n et al. v. National Marine Fisheries Serv. and U.S. Army Corps of Engineers* (Civ. No. 01-640-RE).

<sup>3</sup> In that phase of the litigation, the Treaty Tribes filed joint opening and reply briefs and accompanying declarations in support of plaintiffs' motion for summary judgment (Docket #313-319, 347-348, 375-376), opening and reply briefs in support of the plaintiffs' determination of the scope of the action area (Docket #467-468, 475-477), and joint opening and reply briefs and accompanying declarations in support of the plaintiffs' request for injunctive relief

participated in this phase of this litigation as well. In the successful challenge to NOAA's 2004 FCRPS BiOp and the associated injunction providing spill for fall Chinook in 2005, the Treaty Tribes filed opening and reply memoranda in support of Plaintiffs' and Oregon's motions for summary judgment (Docket #775, 791, 857, 861) along with supporting declarations (Docket #770, 771, 772, 858, 859) and opening and reply memoranda in support of Plaintiffs' motions for injunctive relief (Docket # 838, 840, 964, 971) along with supporting declarations (Docket # 839, 965, 966, 972, 973, 974, 975, 976, 978, 980, 992, 1012).

### **Conclusion**

The matters asserted by the Columbia River Treaty Tribes in the accompanying brief are relevant to this Court's disposition of Defendants' and Defendants-Appellants' request that this Court enter a stay and reverse Senior District Court Judge James A. Redden's June 10, 2005 Opinion and Order granting the Plaintiffs' request to enjoin the Action Agencies to provide spill<sup>4</sup> at

---

to preserve summer spill operations (Docket #511-517, 589-594). The Treaty Tribes have presented oral argument when hearings have been held on these issues, including the summer spill issue (Docket #601). The Treaty Tribes are also represented on the "Attorneys Steering Group" established by the District Court (Docket #449).

<sup>4</sup> The injunction, with respect to relief, directs the Action Agencies to:

(1) Provide spill from June 20, 2005, through August 31, 2005, of all

federal dams on the Columbia and Snake Rivers for Snake River fall Chinook (listed as “threatened” under the Endangered Species Act) and denying the requested flow and drawdown relief.

The matters asserted by the Treaty Tribes are particularly critical in light of the public interest, the Treaty Tribes’ treaty-reserved fishing rights, and the federal governments’ trust responsibility to the Columbia River Treaty Tribes. The Columbia River Treaty Tribes respectfully request this Court to grant them leave to participate as *amicus curiae* in this case.

---

water in excess of that required for station service, on a 24-hour basis, at the Lower Granite, Little Goose, Lower Monumental, and Ice Harbor Dams on the lower Snake River; and

(2) Provide spill from July 1, 2005, through August 31, 2005, of all flows above 50,000 cfs, on a 24-hour basis, at the McNary Dam on the Columbia River.

*NWF v. NMFS*, Docket #1015, p. 10-11 (June 10, 2005).

DATED this 17<sup>th</sup> day of June, 2005.

Respectfully submitted,

Dave Cummings  
DAVID J. CUMMINGS  
OSB # 92269  
(208) 843-7355  
Attorney for *Amicus Curiae*  
Nez Perce Tribe

Christopher B. Leahy by DC \*  
CHRISTOPHER B. LEAHY  
CSB # 23612  
(303) 673-9600  
Attorney for *Amicus Curiae*  
Confederated Tribes of the  
Umatilla Reservation

Howard G. Arnett by DC \*  
HOWARD G. ARNETT  
OSB # 77099  
(541) 382-3011  
Attorney for *Amicus Curiae*  
Confederated Tribes of the Warm  
Springs Reservation of Oregon

Timothy R. Weaver by DC \*  
TIMOTHY R. WEAVER  
WSB # 3364  
(509) 575-1500  
Attorney for *Amicus Curiae*  
Confederated Tribes and Bands of the  
Yakama Indian Nation

\*per authorization